(2)

No. 88-2062
IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1989

Supreme Court, U.S.
FILED
JUL 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

PATRICIA COTTON, on behalf of herself and all others similarly situated,

Petitioners,

v.

PATRICK BABCOCK, in his capacity as Director, of the Michigan Department of Social Services,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

FRANK J. KELLEY
Attorney General

LOUIS J. CARUSO
Solicitor General
Counsel of Record
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

THOMAS L. CASEY
Assistant Solicitor General

CHRISTOPHER D. DOBYNS
Assistant Attorney General

Attorneys for Respondent

25P

STATEMENT OF QUESTION PRESENTED

In a lawsuit brought in federal court by a food stamp recipient against the Director of the Michigan Department of Social Services challenging conduct which had ended several months before the lawsuit was commenced, does the Eleventh Amendment prohibit the federal court from issuing a declaratory judgment that the prior conduct was unlawful, from ordering retroactive payment of food stamps which had allegedly been wrongfully withheld, and from ordering the Director to issue notices to persons who had allegedly been underpaid?

TABLE OF CONTENTS

	Page
STATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	7
WHERE THERE IS NO CURRENT VIOLATION WHEN THE LITIGATION IS FILED, THE ELEVENTH AMENDMENT BARS A FEDERAL COURT FROM MAKING A DECLARATORY JUDGMENT ABOUT PAST CONDUCT, FROM AWARDING RETROACTIVE FOOD STAMP BENEFITS ALLEGEDLY WRONGFULLY WITHHELD, AND FROM AWARDING NOTICE RELIEF	7
CONCLUSION AND RELIEF SOUGHT	20

TABLE OF AUTHORITIES

Pages

Cases

Atascadero State Hospital v Scanlon, 473 US 234 (1985) 18

Bennett v White, 865 F2d 1395 (CA 3, 1989) 14

Cory v White, 457 US 85 (1982) 10

Dellmuth v Muth, ___US___, 57 USLW 4720 (1989) 18,19

Edelman v Jordan, 415 US 651 (1974) 10,13

Ex Parte Young, 209 US 123 (1908) 9,11

Ford Motor Co v Department of Treasury of Indiana, 323 US 459 (1945) 8

Green v Mansour, 474 US 64 (1985) 10,11

Hans v Louisiana, 134 US 1 (1890) 8,18,19

Klaips v Bergland, 715 F2d 477 (CA 10, 1983) 15

Lynch v Lyng, ___F2d___ (No. 88-5533, CA 6, April 7, 1989) 15

Pages

Cases (Cont'd.)

Metzer v Lyng, 687 F Supp 454 (D Minn, 1987) aff'd without opinion 864 F2d 75 (CA 8, 1988) 15

Papasan v Allain, 478 US 265 (1986) 9,10,13

Pennhurst State School & Hospital v Halderman, 465 US 89 (1984) 8,9,11

Pennsylvania v Union Gas Co, ___US___, 57 USLW 4662 (1989) .. 19

Robinson v Block, 869 F2d 202 (CA 3, 1989) 14

Will v Michigan Department of State Police, ___US___, 57 USLW 4677 (1989) 17

Statutes

42 USC § 1983 1,16

7 CFR § 273.21(j)(1)(vii)(B) 3

Constitution

U.S. Const Amend. XI 2

STATEMENT OF THE CASE

Petitioner Cotton was a recipient of Aid to Families with Dependent Children (AFDC) and food stamps. On February 15, 1985, she initiated a class action under 42 USC § 1983 against Respondent Director of the Michigan Department of Social Services (MDSS), alleging that food stamps had been wrongfully withheld from her between March 1, 1984 and December 1, 1984. On cross motions for summary judgment, the United States District Court for the Eastern District of Michigan held that food stamps had been unlawfully withheld and ordered MDSS to restore to Petitioner food stamp benefits which had been wrongfully withheld between March and December 1984 and to provide notice to class members. The United States Court of Appeals for the Sixth Circuit reversed, holding that the

Eleventh Amendment (U.S. Const. Amend. XI) bars the relief sought by Petitioner.

The United States Department of Agriculture (USDA) instituted the food stamp program, in accordance with the Food Stamp Act of 1964, to raise levels of nutrition among low income families. The Secretary of the USDA is required to establish uniform eligibility standards for participants and is required to issue necessary regulations. State agencies of states which participate in the food stamp program assume responsibility for the certification of applicant households and for the issuance of food stamp coupons. The MDSS is the state agency responsible for administering the food stamp program in Michigan. The federal government, through the USDA, funds 100%

of the food stamp benefits and shares the administrative expenses associated with the disbursement of the benefits with participating states on a 50% basis.

The dispute in the instant case involves the method by which the MDSS budgeted public assistance (PA) supplemental payments, either in the form of AFDC benefits or general assistance (GA) benefits for the purpose of determining food stamp allotments. Prior to May 1, 1984, the MDSS did not count any supplemental PA payments as income when calculating food stamp allotments. However, in response to the promulgation of 7 CFR § 273.21(j)(1)(vii)(B) by the Secretary of USDA, the MDSS was required, as of May 1, 1984, to include PA supplemental benefits, issued as a result of a change

in the household's standard of need, as income in calculating food stamp allotments. Accordingly, the MDSS food stamp manual was revised, effective May 1, 1984, to include PA supplemental benefits, which were issued as a result of increased needs, as household income for purposes of determining food stamp allotments. On May 11, 1984, the MDSS, in response to its request, received telephone confirmation from the USDA Food and Nutrition Services (FNS) that the MDSS had properly amended its policy with respect to the counting of supplemental PA benefits as income in conformity with the applicable amended regulation.

On August 28, 1984, the MDSS received a food stamp program policy memo which had been issued by USDA, FNS on

August 13, 1984, to clarify the interaction between two regulations. According to this policy memo, all participating state agencies, including the MDSS, were advised that portions of PA supplemental benefits which are intended to cover needs for a prior month, are to be treated as a non-recurring lump-sum and excluded as income. Accordingly, on November 5, 1984, the MDSS revised its food stamp manual, effective December 1, 1984, to implement the clarified policy described by the FNS memorandum.

For purposes of Respondent's motion for summary judgment in this litigation, Respondent did not dispute that during the period between May 1, 1984 and December 1, 1984, the MDSS's then-existing policy caused a reduction of

Petitioner Cotton's food stamp allotment for the month of July, 1984, because of her receipt of an AFDC supplement in May, 1984, for reimbursement for rent in February, 1984. The policy in question was changed effective December 1, 1984, and Petitioner Cotton instituted this litigation in February, 1985.

REASONS FOR DENYING THE WRIT

WHERE THERE IS NO CURRENT VIOLATION WHEN THE LITIGATION IS FILED, THE ELEVENTH AMENDMENT BARS A FEDERAL COURT FROM MAKING A DECLARATORY JUDGMENT ABOUT PAST CONDUCT, FROM AWARDING RETROACTIVE FOOD STAMP BENEFITS ALLEGEDLY WRONGFULLY WITHHELD, AND FROM AWARDING NOTICE RELIEF.

The fundamental error in Petitioner's argument is found in the assertion that the Eleventh Amendment only bars relief which would result in the payment from a state treasury. See Petition, pp 10-11. This begrudging interpretation of the Amendment is flatly contradicted by many decisions of this Court. Although the express language of the Eleventh Amendment applies only to suits against a State brought by citizens of another State, this Court held that the Amendment also bars suits against a State by citi-

zens of that same State. Hans v Louisiana, 134 US 1 (1890). This broad interpretation of the scope of the Eleventh Amendment is necessary because "...this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in art III." Pennhurst State School & Hospital v Halderman, 465 US 89, 98 (1984). Although the instant case is nominally against director of the MDSS and not the State of Michigan, this Court has consistently recognized that the Eleventh Amendment bars a suit against state officials when "the state is the real substantial party in interest." Ford Motor Co v Department of Treasury of Indiana, 323 US 459, 464 (1945).

The only exception to the general rule that the Eleventh Amendment operates as an absolute bar to a suit is found in Ex Parte Young, 209 US 123 (1908), where the Court held that a suit to enjoin as unconstitutional a state official's action was not barred by the Eleventh Amendment. This theory "has not been provided an expansive interpretation" Pennhurst, supra, 465 US at 102, and "has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past...." Papasan v Allain, 478 US 265, 277-278 (1986).

This Court's decisions have consistently held that if the Eleventh

Amendment applies, it is an absolute bar to the lawsuit regardless of whether the type of relief sought is money damages, Edelman v Jordan, 415 US 651 (1974), equitable relief, Edelman, supra, Cory v White, 457 US 85 (1982), or declaratory judgment, Green v Mansour, 474 US 64 (1985). The Court must look to "the substance rather than to the form" of the relief sought in order to determine whether the Eleventh Amendment permits or prohibits a suit, Papasan, supra, 478 US at 279, 278:

> "Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant. This is true if the relief is expressly denominated as damages. [Citation omitted] It is also true if the relief is tantamount to an award of damages for a past violation of federal law, even though styled as something else." [Footnote omitted]

In the instant case, Petitioner attempts to make much of the fact that the federal government, and not the states, funds food stamp benefits, unlike the AFDC benefits which were at issue in other cases such as Green v Mansour, supra. For Eleventh Amendment purposes, however, such a distinction is irrelevant. If a lawsuit is against a state official to prospectively enjoin an ongoing violation of federal rights, then it may be permitted under the theory of Ex Parte Young, supra. Any other type of lawsuit in federal court--whether denominated as seeking money damages, equitable relief, or declaratory relief--is barred by the Eleventh Amendment if the relief sought would operate against the state, Pennhurst, supra, 465 US at 101, fn 11:

> "The general rule is that a suit is against the sovereign if 'the

> judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" [Citation omitted]

In the instant case, although the federal government funds food stamp benefits, the judgment which Petitioners seek would in fact expend itself upon Michigan's treasury since it would necessarily include certain administrative expenses. Furthermore, despite Petitioner's efforts to characterize its suit as one for prospective relief (to compel the State prospectively to comply with a supposed statutory duty to restore benefits allegedly wrongfully withheld, see Petition, p 12), it is apparent that the relief Petitioner is seeking is indistinguishable from the relief sought

in Edelman v Jordan. This Court has also rejected such a purported distinction in Papasan, supra, where the petitioners asserted a continuing obligation under trust law principles to make payments at a certain level, but the Court rejected petitioners' characterization, 478 US at 280-281:

> "The distinction between a continuing obligation on the part of the trustee and an ongoing liability for past breach of trust is essentially a formal distinction of the sort we rejected in Edelman. *** We discern no substantive difference between a not-yet-extinguished liability for a past breach of trust and the continuing obligation to meet trust responsibilities asserted by the petitioners."

It is apparent that the Court of Appeals decision in the instant case simply does not conflict with any Eleventh Amendment decision of this

Court. Similarly, the conflict between circuits which Petitioner asserts, Petition, pp 13-14, simply does not exist. While it is true that there are a few district and circuit court opinions which contain statements favorable to Petitioners' contentions, such statements are generally dicta and do not include any extended discussion of Eleventh Amendment principles. For example, in Robinson v Block, 869 F2d 202, 214, fn 11 (CA 3, 1989), the statement upon which Petitioner relies is mentioned only in passing, in dicta, in a footnote, without analysis, in the context of a case which was remanded for a finding on a factual issue. The Robinson court cited Bennett v White, 865 F2d 1395, 1407, 1408 (CA 3, 1989), but that case is readily distinguishable since the defendants were

state officers apparently sued in their individual capacities, 865 F2d at 1405, there was already in place an injunction against a continuing violation, 865 F2d at 1407, and the court limited its statement by saying that the district court should only have ordered retroactive relief to the extent that the state would be reimbursed by the federal government, 865 F2d at 1408. Most of the cases cited by Petitioner in support of its supposed conflict between circuits do not even mention the Eleventh Amendment and so are simply irrelevant. See Lynch v Lyng, ___ F2d _____ (No. 88-5533, CA 6, April 7, 1989), Klaips v Bergland, 715 F2d 477 (CA 10, 1983), and Metzer v Lyng, 687 F Supp 454 (D Minn, 1987) aff'd without opinion 864 F2d.75 (CA 8, 1988).

Apart from the Eleventh Amendment bar, there is another reason why this Court should not review this case. This suit was brought under 42 USC § 1983 and is now against a state official solely in his official capacity. To the extent it was brought against the official in an individual capacity, the District Court ruled that the Director was immune from money damages. Appendix to the Petition, p 15. Petitioner did not appeal that ruling to the Court of Appeals and has now substituted the successor official, presumably pursuant to Supreme Court Rule 40.3. See Petition, p ii. Because this action is now only against the Director in his official capacity, it is barred because this Court recently held that "neither a State nor its officials acting in their official capacities are

'persons' under [42 USC] § 1983." Will v Michigan Department of State Police, ___ US___, 57 USLW 4677, 4680 (1989).

In summary, it simply cannot be said that there is sufficient conflict between the circuits, or between the Court of Appeals here and this Court's decisions, to warrant review by this Court.

Petitioner also asserts that review should be granted to determine whether the Food Stamp Act abrogates the state's Eleventh Amendment immunity. It must be observed that the district court did not reach this question, Appendix to the Petition, p 13, fn 11, and it was not presented to the Court of Appeals until after the decision when Petitioner filed a motion for rehearing which was denied in an order. Appendix to the Petition,

p 37. In any event, it is apparent that the contention is without merit. The Court has enunciated a "simple but stringent test" for determining whether Congress has abrogated a state's Eleventh Amendment immunity:

> "Congress may abrogate the state's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." Dellmuth v Muth, ___US___, 57 USLW 4720, 4722 (1989) quoting Atascadero State Hospital v Scanlon, 473 US 234, 242 (1985).

Respondent submits that nothing in the text of the Food Stamp Act indicates the "unmistakably clear" intention of Congress to abrogate the state's Eleventh Amendment immunity.

Petitioner also asserts that this Court should overrule Hans v Louisiana.

Petition, pp 21-23. It must be noted that this claim was never presented to the district court or the Court of Appeals. In any event, it, too, is without merit since the Court has very recently indicated its disinclination to overrule Hans. Dellmuth v Muth, supra, 57 USLW at 4722, fn 2; Pennsylvania v Union Gas Co, ___US___, 57 USLW 4662, at 4672, fn 8 (opinion of White, J.), 4672 (opinion of Scalia, J., joined by the Chief Justice, Justice O'Connor and Justice Kennedy) (1989).

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
Counsel of Record
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

Thomas L. Casey
Assistant Solicitor General

Christopher D. Dobyns
Assistant Attorney General